10-2827

To Be Argued By:
MARC H. SILVERMAN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-2827

UNITED STATES OF AMERICA,
Appellee,

-vs-

MAURIEL GLOVER, aka Feet,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on June 29, 2010. Defendant's Appendix ("DA") 2-3; Government Appendix ("GA") 12. On June 26, 2010, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). DA 1; GA 12. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issue
Presented for Review

Did the district court abuse its discretion in denying the defendant's motion to withdraw his guilty plea filed nearly two years after the change of plea proceeding without any assertion of innocence and accompanied by an affidavit that contradicted the plea agreement executed in open court and the defendant's sworn, in-court statements?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-2827

UNITED STATES OF AMERICA,
Appellee,

-vs-

MAURIEL GLOVER, aka Feet,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is an appeal from the denial of the defendant's motion to withdraw his guilty plea. The defendant was a crack cocaine distributor in the New Haven area. On May 20, 2008, he pleaded guilty to conspiring to possess with intent to distribute and to distribute fifty grams or more of a mixture and substance containing cocaine base. Nearly two years later, the defendant moved to withdraw his guilty plea, alleging, for the first time, that his guilty plea

was obtained through threats from the prosecutor and misrepresentations by his former defense counsel.

The district court (Janet C. Hall, J.) denied the defendant's motion. She noted that the lengthy delay in filing the motion after his plea counseled against granting it and that the defendant's new allegations were inconsistent with his statements to the court during his plea colloquy and also inconsistent with his subsequent letters to the court in which he complained about his failure to receive a § 5K substantial assistance motion but never mentioned any concerns about the voluntariness of his guilty plea.

As set forth below, the district court acted well within its discretion in denying the defendant's motion to withdraw his guilty plea. The district court's judgment should be affirmed.

Statement of the Case

On December 11, 2007, the defendant was arrested pursuant to a criminal complaint. GA 1. On January 8, 2008, a federal grand jury returned an Indictment charging the defendant in Count One with conspiring to possess with intent to distribute and to distribute fifty grams or more of a mixture and substance containing cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A); in Counts Two, Three, Four, Five, and Six with possession with intent to distribute five grams or more of a mixture and substance containing a detectable amount of cocaine base, in violation of 21 U.S.C.

§§ 841(a)(1) and 841(b)(1)(B); and in Count Seven with conspiring to possess with intent to distribute and to distribute a mixture and substance containing a detectable amount of cocaine base, in violation of 21 U.S.C. §§ 846 and 841(a)(1). GA 1-2.

On May 20, 2008, the defendant pleaded guilty to Count One of the Indictment before the Honorable Holly B. Fitzsimmons, United States Magistrate Judge. GA 4. On May 27, 2008, the Honorable Janet C. Hall, United States District Judge, accepted the defendant's guilty plea. GA 4.

Following several continuances of sentencing, on September 24, 2009, the district court appointed substitute defense counsel at the defendant's request. GA 9. On April 8, 2010, the defendant moved to withdraw his guilty plea. GA 10. Following briefing on the motion to withdraw, on May 20, 2010, the district court held a hearing and denied the motion. GA 11.

On June 22, 2010, the district court sentenced the defendant to 252 months of imprisonment, ten years of supervised release, and payment of the mandatory $100 special assessment. GA 12. The Government moved to dismiss Counts Two, Three, Four, Five, Six, and Seven of the Indictment, and the district court granted that motion. GA 12. On June 29, 2010, judgment was entered. GA 12. On June 26, 2010, the defendant timely filed a notice of appeal of the district court's judgment. GA 12.

In this appeal, the defendant challenges only the district court's denial of his motion to withdraw his guilty plea. The defendant currently is serving his sentence of imprisonment.

Statement of Facts and Proceedings Relevant to this Appeal

In this appeal, the defendant challenges the district court's decision to deny his motion to withdraw his guilty plea.

A. The Plea Agreement[1]

On May 20, 2008, the defendant entered into a written plea agreement, in which he agreed to plead guilty to Count One of the Indictment. In the plea agreement, the defendant acknowledged that:

> [H]e is entering into this agreement and is pleading guilty freely and voluntarily because he is guilty. The defendant further acknowledges that he is entering into this agreement without reliance upon any discussions between the Government and him (other than those described in the plea agreement letter), without promise of benefit of any kind (other than the concessions contained in the plea

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[1] The executed version of plea agreement has been lost, but the defendant agrees that the unsigned version included in the Government's appendix, *see* GA 14-21, is identical to the agreement executed in open court on May 20, 2008.

> agreement letter), and without threats, force, intimidation, or coercion of any kind. The defendant further acknowledges his understanding of the nature of the offense to which he is pleading guilty, including the penalties provided by law. The defendant also acknowledges his complete satisfaction with the representation and advice received from his undersigned attorney. The defendant and his undersigned counsel are unaware of any conflict of interest concerning counsel's representation of the defendant in this case.

GA 19. Moreover, the defendant acknowledged "that no other promises, agreements, or conditions have been entered into other than those set forth in this plea agreement, and none will be entered into unless set forth in writing, signed by all the parties." GA 20-21.

B. The Cooperation Agreement

On May 20, 2008, the defendant also entered into a written cooperation agreement. The cooperation agreement set forth that if the Government determined that the defendant provided "substantial assistance" in the investigation or prosecution of another person, the Government would file a motion pursuant to 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1.

C. The Change of Plea Proceeding[2]

Also on May 20, 2008, the defendant entered a guilty plea before the Honorable Holly B. Fitzsimmons, United States Magistrate Judge. At the court's request, the Government summarized the plea agreement, highlighting, among other things:

- The defendant "acknowledges his guilt in the offense charged in Count One." GA 45.

- "He acknowledges the voluntariness of his plea." GA 45.

- "He also agrees, and the Government does too, that there will be no other promises entered into between the parties unless they are reduced to writing and presented to the Court." GA 45.

The court subsequently inquired if "that written Plea Agreement that you've signed, fully and accurately reflect[s] your understanding of the agreement that you've

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[2] The defendant's appendix includes a certified copy of the transcript from the May 20, 2008 change of plea proceeding. As noted by defense counsel, there are several gaps in that transcript attributed to skips in the recording. *See, e.g.,* DA 8, 29, 30, 32, 33. At the Government's request, the court reporter reviewed the original recording of the plea proceeding and was able to produce a corrected transcript that filled the gaps in the transcript. The corrected transcript was docketed, *see* GA 13, and it is included in the Government's appendix, *see* GA 22-73.

made with the Government?" GA 47. The defendant answered: "Yes, Your Honor." GA 47.

The court asked: "Other than promises that have been made to you in writing, has anyone made any other promises or representations to you that are influencing your decision to plead guilty?" GA 48. The defendant answered, "No." GA 48. The court then stated:

> All right. Specifically – And the reason I'm asking you that, Mr. Glover, is because if someone said something to you that you're counting on to happen, and it's not written down somewhere, Judge Hall is not going to know about it. She only knows what's written down and what she hears at the time of sentencing from you and from your lawyer and from the government's lawyer, and if somebody made you a promise, specifically about what kind of a sentence that she's going to give you, she doesn't know about it and she's not bound by it. You know, her responsibility is to follow the law of sentencing, but somebody else can't speak for her at this point and, in fact, she doesn't know yet, what the right sentence for you is going to be, and she won't know until the whole sentencing process goes forward, the presentence report gets written, everybody gets to look at it, you get to contest any facts that you disagree with in the presentence report, and then there's a hearing at which you get to talk, if you want, and Ms. Murray gets to talk, and the Prosecutor gets to talk.

You understand all of that?

GA 48-49. The defendant answered, "Uh-huh. Yes." GA 49. After the defendant and defense counsel conferred, the court confirmed again, "Understand that?" GA 49. The defendant answered, "Yes, ma'am." GA 49.

The court emphasized the uncertainty of the defendant's sentence and then further canvassed the defendant:

Court: Has anyone threatened you in any way to get you to plead guilty under these terms?

Defendant: No.

Court: Is anyone forcing you, by any means, to plead guilty under these terms?

Defendant: Excuse me?

Court: Is anybody forcing you, in any way, to do this?

Defendant: No.

Court: Have you decided to do this of your own free will, Mr. Glover?

Defendant: Yes.

Court: You think it's the best thing for you to do under the circumstances?

Defendant: Yes.

Court: All right. Then I find that the Plea Agreement has been voluntarily, knowingly and understandingly made, and it may be filed, Ms. Murray.

GA 62-63. The court later asked, "Do you know of any reason then, Mr. Glover, why I should not allow you to plead guilty to this charge?" The defendant responded, "No." GA 64. Immediately before permitting the defendant to enter his guilty plea, the court made the following findings:

> Then on the basis of the answers given by Mr. Glover under oath on the record in the presence of his lawyer, based on the facts contained in the Plea Agreement, the remarks of both counsel, I do find the Defendant is competent to plead; he understands his right to a trial and the other rights he waives by pleading guilty; he knows what the maximum possible sentence is, and the mandatory minimum sentence and period of supervised release, and also the role that the Sentencing Guidelines will play in determining his sentence.
>
> I find also, that there is a factual basis for the Defendant's plea of guilty, and that if he does plead

guilty, he'll be doing so voluntarily, knowingly and of his own free will.

GA 65-66.

D. The Finding and Recommendation on a Plea of Guilty

After the change of plea proceeding, Magistrate Judge Fitzsimmons filed a "Finding and Recommendation on a Plea of Guilty" recommending "to Judge Hall that the defendant's plea of guilty be accepted." GA 74-75. To support that recommendation, Magistrate Judge Fitzsimmons found "that the defendant is competent to plead, that defendant understands the charges against him, that he knows his rights to trial and appeal, that he knows what the maximum possible sentence and term of supervised release are, and that the sentencing guidelines may apply[,] that there is a factual basis for the defendant's plea, waiver of rights and plea of guilty have been knowingly and voluntarily made and not coerced." GA 74.

On May 27, 2008, the Honorable Janet C. Hall, United States District Judge, adopted and affirmed Magistrate Judge Fitzsimmons's Finding and Recommendation on a Plea of Guilty. GA 4.

E. Post-Plea Correspondence from the Defendant to the District Court and the Defendant's Motion to Withdraw his Guilty Plea

Following the entry of the defendant's guilty plea, he sent three letters to the attention of Judge Hall.[3] In these letters, the defendant voiced concerns to the Judge, but never asserted the grounds on which he later relied in moving to withdraw his guilty plea.

In the first letter, received by the district court on October 6, 2008, the defendant expressed concern about the representation he was receiving from his lawyer. GA 76. The district court held a hearing on the matter on October 21, 2008. *See* GA 77-91. At the hearing, the district court did not delve into any conflict between the defendant and his lawyer, and the defendant never stated that his attorney had made misrepresentations prior to the change of plea proceeding. His lawyer, however, stated that the defendant "has expressed a desire to take certain actions in his case that I consider to be potentially devastating to his interest." GA 79. The district court pointedly asked whether the defendant wanted a new

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[3] The three letters were each date-stamped and marked received by the district court, and sent to counsel. The letters were referenced at the May 20, 2010 proceeding. *See, e.g.*, DA 40, 41, 111. The Government filed an unopposed motion to supplement the record on appeal with these letters, and this Court granted that motion on June 27, 2011. The letters are included in the Government's appendix. *See* GA 76, 92-94, 95-97.

lawyer. *See* GA 87. The defendant responded by saying, "[s]he is a good person. She did go to measures for some things that help me out. I will say I'm happy with her. I will take her. I'm happy with her." GA 87.

The defendant sent a second letter to Judge Hall in February 2009. GA 92-94. This letter, like the first, made no mention of a desire to withdraw his guilty plea. The defendant merely provided information to the Judge about his background and the positive contributions he believed he had made to his community. GA 92-94.

Nearly seven months later, on September 17, 2009, the district court received a letter from the defendant complaining about the Government's decision not to file a § 5K1.1 motion on his behalf.[4] *See* GA 95-97. Although this letter referenced the defendant's desire to withdraw his guilty plea, it focused exclusively on the Government's decision not to submit a letter pursuant to U.S.S.G. § 5K1.1. The defendant wrote:

> I will like to take my plea back and go to trial. [A]t leas[t] if I los[e] I can have my ap[p]eal rights. Your Honor[,] I[']m sorry but I just not going to

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[4] Prior to this date, the Government had informed defense counsel that it did not plan to file a motion pursuant to 18 U.S.S.C. § 3553(e) or U.S.S.G. § 5K1.1. *See* DA 111. The defendant had provided two inconsistent versions of events during different proffer sessions, thereby breaching his obligation to tell the complete truth as set forth in the cooperation agreement. *See, e.g.*, DA 48-52.

> take 20 year[s] and I help the government the best I could if they don[']t grant me the 5K1 which I deserve I want a chance to fight s[i]nce the Government got down and dirty and use me for about a year for all my information.

GA 96. The defendant repeated, "[C]an I please take my plea back if they don[']t want to give me a 5K1." GA 97.

At the scheduled sentencing hearing on September 24, 2009, instead of proceeding with sentencing, the district court appointed new counsel, *see* GA 134-37, after hearing from the defendant that he wanted to withdraw his guilty plea because he felt entitled to a § 5K1.1 motion, *see* GA 129-34.

Approximately seven months after new counsel was appointed, on April 8, 2010, the defendant filed two motions. First, he filed a motion to withdraw his guilty plea. GA 10. The defendant asserted that his guilty plea was obtained through threats from the prosecutor and misrepresentations by his former defense counsel. As the district court later summarized the defendant's argument, he "claim[ed] that just prior to his change of plea in front of Judge Fitzsimmons on May 20, 2008, . . . certain things were said to him both by his attorney and by the government prosecutor." DA 37.

Specifically, as set forth in an affidavit dated April 7, 2010 and filed under seal, but quoted in full in the defendant's brief, the defendant asserted that in the lock-up immediately before his May 20, 2008 change of plea

proceeding, the prosecutor threatened that if the defendant did not plead guilty, "he would get an 'all-white jury' from Greenwich." The defendant further alleged that his former defense counsel told him he would receive a sentence of less than twenty years if he "cop[ped] out now," he would "get nowhere near" twenty years if he pleaded guilty, and that he "had" the § 5K1.1 motion. Def. Br. at 10-12.

Second, the defendant filed a motion to compel the Government to file a § 5K1.1 motion. *See* GA 10. The defendant argued that "his cooperation was so overwhelmingly helpful that it crie[d] out for the award of the 5K." DA 113-14, 115.

F. The May 20, 2010 Proceeding

On May 20, 2010, the district court considered the defendant's motion to withdraw his guilty plea and his motion to compel the Government to file a § 5K1.1 motion. The district court denied both motions, *see* DA 113 (concluding that the motion to withdraw "falls way short"), 119 (concluding that the Government was reasonable in not filing a § 5K letter),[5] but the defendant's current appeal challenges only the denial of the motion to withdraw his guilty plea.

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[5] The district court rejected the defendant's argument that he substantially complied with the cooperation agreement because the Government "reasonably concluded [there] was a change in statements to the government on key material matters at issue in the case." DA 119.

With respect to the defendant's motion to withdraw his guilty plea, the district court observed that the defendant "told Judge Fitzsimmons he was acting voluntarily and knowingly. He told Judge Fitzsimmons he knew that the sentence I would impose could never be promised to him that day. No one could tell him what it would be. He said he understood that." DA 39. Defense counsel agreed: "That's what the transcript said and that's what he said, yes, your Honor." DA 39.

In rejecting the defendant's motion to withdraw his guilty plea, the district court referenced, *inter alia*, the defendant's April 7, 2010 affidavit; the May 20, 2008 change of plea colloquy; the plea agreement itself; and the defendant's correspondence with the district court. *See, e.g.*, DA 107-10.

Furthermore, the district court identified – and rejected – the more likely explanation motivating the defendant's motion to withdraw his guilty plea, namely that he had not received a § 5K1 motion:

> He can't decide after events unfold that he doesn't like the situation he's in and therefore, in effect, try to come back in to withdraw the guilty plea by boldly saying that well, yes indeed promises were made to me even though I told the judge they weren't made to me. I understand I would get a 5K even though he was told he had no guarantee of getting a 5K. The entry of guilty plea is a significant act and I believe that the colloquy conducted by Judge Fitzsimmons made it

> sufficiently clear to Mr. Glover that it was [a] grave step on his part to plead guilty. She provided him ample opportunity to express to her any of the concerns he now raises. The public has an interest in the finality of the guilty plea and if we were to allow defendants to withdraw such pleas absent some good showing of reason why it should be withdrawn, it would undermine the confidence of the public in our judicial procedures.

DA 110-11; *see also* DA 42 (explaining that the defendant "waited until it became clear he wouldn't get a 5K. In my view from my perspective, he waited that long until he started saying he didn't mean what he said to Judge Fitzsimmons.").

Moreover, the district court thoroughly analyzed three factors – the time lapse between entry of the guilty plea and the motion to withdraw the guilty plea, the absence of any assertion of innocence, and the prejudice to the Government. *See* DA 111-13. First, the district court remarked that the defendant's delay "is by far the longest period of time I can recall of any case where a defendant has waited to [] withdraw a guilty plea." DA 111. The district court noted that more than one year passed between entry of the guilty plea and the appointment of new counsel in which the defendant never indicated any desire to withdraw his guilty plea on the grounds asserted on April 8, 2010. *See* DA 111-12. Moreover, the district court observed that the motion to withdraw was not "forthcoming immediately upon second counsel coming in." DA 111. The district court concluded that, "I don't

believe the defendant can in effect meet the burden he has to immediate that he promptly came forward." DA 112.

Second, the district court found that the defendant "has not made any assertion of innocence." DA 112. To the contrary, the district court observed that in the defendant's September 2009 letter:

> [H]e talks about how everything he told the government is truthful. What he told the government was he was a drug dealer. A drug dealer in New Haven in the time period charged in the indictment with some of the people named in the indictment. He also told that to Judge Fitzsimmons in May of 2008. At no time has he said that he was not a drug dealer including up until today when in response to questioning on the witness stand, he acknowledged that he dealt drugs. So he's not asserting his innocence so again he fails in that aspect.

DA 112.

Third, the district court observed that it need not reach the prejudice consideration, but determined that withdrawal of the guilty plea would result in prejudice to the Government. The district court considered the "possible loss of at least one witness through what appears to be witness tampering." DA 112-13. The district court further observed that "the government tried this case four times and could have tried Mr. Glover. On at least two of

those occasions, I believe were Glover defendants. It seems [to] me is a prejudice to the government." DA 113.

In sum, the district court considered several factors in denying the defendant's motion to withdraw his guilty plea: the plea colloquy, the content of the letters sent from the defendant to the district court after the entry of the guilty plea, the time that lapsed between entry of the guilty plea and the motion to withdraw, the absence of any assertion of innocence, and the prejudice to the Government that would arise from withdrawal of the guilty plea. The district court ultimately concluded that the defendant's motion to withdraw his guilty plea "falls way short of what would cause this court to even beg[i]n to consider to allow the withdrawal of a guilty plea by Mr. Glover." DA 113.

Summary of Argument

The district court acted well within its discretion in denying the defendant's motion to withdraw his guilty plea. The district court properly relied on the plea agreement executed in open court, the defendant's sworn, in-court statements at the change of plea proceeding, and the Finding and Recommendation on a Plea of Guilty by Magistrate Judge Fitzsimmons in determining that the defendant voluntarily entered the guilty plea. Furthermore, the district court properly concluded that the nearly two years that elapsed between the entry of the guilty plea and the motion to withdraw, the absence of any assertion of innocence, and the prejudice to the Government that would arise from withdrawal all weighed against

permitting withdrawal of the defendant's guilty plea. The district court acted well within its discretion in considering these factors and denying the defendant's motion to withdraw his guilty plea. Accordingly, the Court should affirm in all respects.

Argument

I. The district court did not abuse its discretion in denying the defendant's motion to withdraw his guilty plea.

The district court's reasoning, as set forth on the record during the May 20, 2010 hearing, reflects careful consideration of the defendant's arguments and the absence of any abuse of discretion.[6]

A. Governing Law and Standard of Review

Federal Rule of Criminal Procedure 11(d)(2)(B) permits a defendant to withdraw a guilty plea "after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal." However, "a guilty plea is a grave and solemn act," *Brady v. United States*, 397 U.S.

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[6] The defendant notes that the plea agreement he entered included an appeal waiver, but argues that his appeal should not be precluded on the facts of this case. This Court need not consider the defendant's argument because the Government does not rely on the appeal waiver to preclude the defendant's appeal.

742, 748 (1970), and, accordingly, "[t]he standard for withdrawing a guilty plea is stringent because society has a strong interest in the finality of guilty pleas, and allowing withdrawal of pleas not only undermines confidence in the integrity of our judicial procedures, but also increases the volume of judicial work, and delays and impairs the orderly administration of justice," *United States v. Doe*, 537 F.3d 204, 211 (2d Cir. 2008) (internal quotation marks omitted).

"A defendant has no absolute right to withdraw his plea of guilty." *United States v. Williams*, 23 F.3d 629, 634 (2d Cir. 1994). Indeed, "[t]he fact that a defendant has a change of heart prompted by his reevaluation of either the Government's case against him or the penalty that might be imposed is not a sufficient reason to permit withdrawal of a plea." *United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir. 1992).

To evaluate whether a defendant has met the stringent standard for withdrawal of a guilty plea:

> a court should consider: (1) whether the defendant has asserted his or her legal innocence in the motion to withdraw the guilty plea; (2) the amount of time that has elapsed between the plea and the motion (the longer the elapsed time, the less likely withdrawal would be fair and just); and (3) whether the government would be prejudiced by a withdrawal of the plea.

United States v. Carreto, 583 F.3d 152, 157 (2d Cir. 2009) (internal quotation marks omitted), *cert. denied*, 130 S. Ct. 813 (2009), and *cert. denied*, 130 S. Ct. 1555 (2010); *see also Doe*, 537 F.3d at 210. However, where "the claim-of-innocence and the elapsed-time criteria [a]re not met . . . the court . . . [is] not required to reach[] the question of whether withdrawal of the plea would cause the government prejudice." *United States v. Rosen*, 409 F.3d 535, 547 (2d Cir. 2005).

"Where a motion to withdraw a plea is premised on involuntariness, the 'defendant must raise a significant question about the voluntariness of the original plea.'" *Doe*, 537 F.3d at 211 (quoting *United States v. Torres*, 129 F.3d 710, 715 (2d Cir. 1997)). A court need not hold an evidentiary hearing unless the defendant "present[s] some significant questions concerning the voluntariness or general validity of the plea to justify an evidentiary hearing. No hearing need be granted where the allegations on a motion to withdraw a guilty plea before sentencing merely contradict the record, are inherently incredible, or are simply conclusory." *Gonzalez*, 970 F.2d at 1100 (internal citations omitted). A "court can [] rely on a defendant's in-court sworn statements that he 'understood the consequences of his plea, had discussed the plea with his attorney, [and] knew that he could not withdraw the plea.'" *Carreto*, 583 F.3d at 157 (quoting *United States v. Hernandez*, 242 F.3d 110, 112 (2d Cir. 2001) (per curiam)).

This Court reviews "a district court's denial of a motion to withdraw a guilty plea for abuse of discretion."

Carreto, 583 F.3d at 157; *see also Rosen*, 409 F.3d at 546 ("[T]he decision whether to grant the motion to withdraw is committed to the district court's discretion and will be reversed only for abuse of discretion.").

B. Discussion

The voluntariness of the guilty plea, as demonstrated by the plea agreement, the change of plea proceeding, and the Finding and Recommendation on a Plea of Guilty by Magistrate Judge Fitzsimmons; the lapse of nearly two years between entry of the guilty plea and the motion to withdraw; the absence of any assertion of innocence; and the prejudice to the Government that would arise from withdrawal, all weighed against permitting withdrawal. The district court therefore acted well within its discretion in denying the defendant's motion to withdraw his guilty plea.

1. Voluntariness

The defendant argues that his guilty plea was not entered voluntarily as a result of alleged threats made by the prosecutor and alleged misrepresentations made by former defense counsel preceding the change of plea proceeding. As noted by the district court, however, the defendant's assertions are plainly contradicted by the text of the plea agreement executed in open court, GA 14-21; the transcript of the plea colloquy, GA 22-73; and the Finding and Recommendation on a Plea of Guilty entered by Magistrate Judge Fitzsimmons, GA 74-75.

As set forth above, in the plea agreement, the defendant explicitly acknowledged that "he is entering into this agreement and is pleading guilty freely and voluntarily because he is guilty. The defendant further acknowledges that he is entering into this agreement without reliance upon any discussions between the Government and him (other than those described in the plea agreement letter), without promise of benefit of any kind (other than the concessions contained in the plea agreement letter), and without threats, force, intimidation, or coercion of any kind." GA 19. Moreover, "[t]he defendant acknowledge[d] that no other promises, agreements, or conditions have been entered into other than those set forth in this plea agreement, and none will be entered into unless set forth in writing, signed by all the parties." GA 20-21.

In addition, Magistrate Judge Fitzsimmons thoroughly canvassed the defendant prior to the entry of his guilty plea. She specifically inquired about threats and coercion, and the defendant expressly affirmed that he was pleading guilty voluntarily, and that nobody had threatened or coerced him into pleading guilty. GA 62-63. Magistrate Judge Fitzsimmons later asked, "Do you know of any reason then, Mr. Glover, why I should not allow you to plead guilty to this charge?" The defendant responded, "No." GA 64.

During the plea colloquy, the defendant never raised any concerns about the voluntariness of his plea. Indeed, the defendant explicitly acknowledged that he voluntarily entered his guilty plea. The defendant's April 7, 2010 affidavit, filed nearly two years after his change of plea

proceeding and after the Government decided not to file a motion pursuant to 18 U.S.S.C. § 3553(e) or U.S.S.G. § 5K1.1, therefore contradicts his sworn, in-court statements. Accordingly, the district court was well within its discretion in relying on the defendant's prior statements in concluding that the guilty plea was entered voluntarily. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); *Carreto*, 583 F.3d at 157 ("The district court can also rely on a defendant's in-court sworn statements that he 'understood the consequences of his plea, had discussed the plea with his attorney, [and] knew that he could not withdraw the plea.'" (quoting *Hernandez*, 242 F.3d at 112)); *United States v. Diaz*, 176 F.3d 52, 114 (2d Cir. 1999) (denying application to remand for evidentiary hearing where defendant claimed that he was threatened into pleading guilty in part because his claim was contradicted by the defendant's sworn statements during the plea allocution); *United States v. Torres*, 129 F.3d 710, 715 (2d Cir. 1997) ("A defendant's bald statements that simply contradict what he said at his plea allocution are not sufficient grounds to withdraw the guilty plea.").

Even putting aside the portions of the corrected transcript that do not appear in the version of the transcript included in the defendant's appendix, the district court was well within its discretion in concluding that the guilty plea was entered voluntarily. In describing the plea agreement, the prosecutor noted that the defendant "acknowledge[d] his guilt in the offense charged in Count One," "acknowledge[d] the voluntariness of his plea," and

"agree[d] . . . that there will be no other promises entered into between the parties unless they are reduced to writing and presented to the Court." DA 24. The defendant agreed that the plea agreement "fully and accurately, reflect[ed] [his] understanding of the agreement . . . made with the Government." DA 26.

Magistrate Judge Fitzsimmons asked: "Other than promises that have been made to you in writing, has anyone made any other promises or representations to you that are influencing your decision to plead guilty?" DA 27. The defendant answered, "No." DA 27. Magistrate Judge Fitzsimmons then underscored the uncertainty of the sentence that would be imposed on the defendant and he acknowledged his understanding of that uncertainty. DA 27-28.

Magistrate Judge Fitzsimmons also inquired about the defendant's criminal conduct:

> Court: And in this particular case, what the Government has charged you with is entering into an agreement with one or more of the people who are listed in the Indictment, to distribute crack. Did you do that?
>
> Defendant: Yes.
>
> Court: All right. And was the amount of crack that was involved in this

agreement, more than 50 grams of crack?

Defendant: Yes.

Court: And at the time that you were participating in this agreement, did you understand that it was against the law to deal in crack?

Defendant: Yes.

DA 30. Accordingly, even with the gaps in the transcript of the change of plea proceeding, there is ample support for the district court's conclusion that the defendant voluntarily entered his guilty plea.

In addition to the plea agreement itself and the transcript of the change of plea proceeding, Magistrate Judge Fitzsimmons entered a Finding and Recommendation on a Plea of Guilty. "[F]ollowing a hearing held in open court and on the record, based upon the answers given by the defendant under oath, on the record, and in the presence of counsel; and the remarks of defense counsel and the Assistant United States Attorney," Magistrate Judge Fitzsimmons found, *inter alia*, "that there is a factual basis for the defendant's plea, [and] waiver of rights and plea of guilty have been knowingly and voluntarily made and not coerced." GA 74. Magistrate Judge Fitzsimmons therefore recommended "to Judge Hall that the defendant's plea of guilty be accepted." GA 75. Shortly thereafter, the district court entered an order

adopting and affirming the Finding and Recommendation of Magistrate Judge Fitzsimmons. GA 4.

Far from an abuse of discretion, the plea agreement, the transcript – even with gaps – of the change of plea proceeding, and the Finding and Recommendation of Magistrate Judge Fitzsimmons provided ample support for the district court's conclusion that the defendant voluntarily entered his guilty plea. Accordingly, the defendant failed to show a fair and just reason for requesting the withdrawal of his guilty plea.

Moreover, as the district court noted, there was another, more plausible, explanation for the defendant's new-found interest in withdrawing his plea: dissatisfaction with his sentencing exposure in the absence of a § 5K1.1 motion. *See* DA 42 (explaining that the defendant waited to move to withdraw his guilty plea "until it became clear he wouldn't get a 5K. In my view from my perspective, he waited that long until he started saying he didn't mean what he said to Judge Fitzsimmons."), 110 ("He can't decide after events unfold that he doesn't like the situation he's in and therefore, in effect, try to come back in to withdraw the guilty plea by boldly saying that well, yes indeed promises were made to me even though I told the judge they weren't made to me. I understand I would get a 5K even though he was told he had no guarantee of getting a 5K."). But as this Court has held, "[t]he fact that a defendant has a change of heart prompted by his reevaluation of . . . the penalty that might be imposed is not a sufficient reason to permit withdrawal of a plea." *Gonzalez*, 970 F.2d at 1100. In other words, where, as

here, a defendant seeks to withdraw his plea because he does not like his sentencing exposure, his motion should be denied.

2. Lapse of Time

The defendant entered his plea of guilty on May 20, 2008. GA 4. On September 17, 2009, the district court received a letter from the defendant in which he mentioned, for the first time, his desire to "take my plea back if [the Government doesn't] want to give me a 5K1." GA 97. The letter made no mention of the voluntariness of the plea. The defendant instead underscored his belief that he deserved a "5K1." GA 95-97. On April 8, 2010, for the first time, the defendant moved to withdraw his guilty plea on the ground of voluntariness. GA 10. Between May 20, 2008 and April 8, 2010, one year, ten months, and nineteen days passed.

Far from acting arbitrarily, the district court properly considered this lapse of time in evaluating the defendant's motion to withdraw his guilty plea. *See Carreto*, 583 F.3d at 157 (directing district courts to consider "the amount of time that has elapsed between the plea and the motion (the longer the elapsed time, the less likely withdrawal would be fair and just)"). The district court emphasized that the defendant never raised any issue related to the voluntariness of his plea in his correspondence to the district court. *See* DA 41 ("He wrote to me in February of '09 which was eight months after his change of plea and in that letter, I don't think he said anything other than how he was doing well and he was trying to be a better

person."), 111 ("I have a letter of September 2009 in which he is clearly upset about the possibility of not getting a 5K and tells me that he's been truthful but never in there does he raise any issue about his guilty plea."). In finding that the time lapse weighed against withdrawal, the district court stated, "I haven't looked at every case but it is by far the longest period of time I can recall of any case where a defendant has waited to withdraw a guilty plea." DA 111.

Indeed, the nearly two year period that elapsed in the instant case far exceeds the time periods in other cases in which courts have denied withdrawal. *See Carreto*, 583 F.3d at 157 (concluding that "the district court did not abuse its discretion" in "denying defendants' motions to withdraw their pleas" in part because "defendants did not move to withdraw their pleas until approximately a year after they had pled guilty"); *Doe*, 537 F.3d at 211 (reasoning that "the five-month lapse in time between his plea and the bringing of his motion" to withdraw the guilty plea, "informed the district court's denial of his motion"); *United States v. Grimes*, 225 F.3d 254, 259 (2d Cir. 2000) (per curiam) (determining that "the district court was well within its discretion in deciding to reject" a motion to withdraw a guilty plea, in part because "[a]lmost five months passed between the date of [the defendant's] guilty plea and his first indication that he wished to withdraw it").

Even considering the shorter period between the appointment of substitute defense counsel on September 24, 2009 and the filing of the motion to withdraw on April

8, 2010, six months and fifteen days elapsed. The district court found it "curious" that no motion to withdraw was "forthcoming immediately upon second counsel coming in." DA 111. The ensuing delay lasted longer than six months and weighed against permitting withdrawal. *See Doe*, 537 F.3d at 211 ("five-month lapse in time between his plea and the bringing of his motion"); *Grimes,* 225 F.3d at 259 ("[a]lmost five months passed between the date of [the defendant's] guilty plea and his first indication that he wished to withdraw it").

Accordingly, the district court acted well within its discretion in concluding that the lapse of time weighed against permitting withdrawal of the defendant's guilty plea.

3. Absence of Any Assertion of Innocence

As the district court noted, the defendant has never asserted his innocence. Such assertions are conspicuously absent from the transcript of the change of plea proceeding, the three letters received by the district court, the motion for withdrawal of the guilty plea, and the attached affidavit. As this Court has repeatedly held, the absence of any assertion of innocence weighs against permitting withdrawal. *Carreto*, 583 F.3d at 157 (directing district courts to consider "whether the defendant has asserted his or her legal innocence in the motion to withdraw the guilty plea"); *Doe*, 537 F.3d at 210 (directing district courts to evaluate "whether the defendant has asserted a claim of legal innocence").

On this point, the defendant's reliance on the transcript of the May 20, 2010 proceeding before the district court to support an assertion of innocence is misplaced. At that proceeding, when asked about an assertion of innocence, defense counsel stated:

> The only statement I can point to in the affidavit I believe is that he indicated that he did want to go to trial to his lawyer while he was in the lock up. To that extent, I would assert that's an assertion of innocence and that he wants to maintain his presumption.

DA 44-45. As the district court reasoned in response, proceeding to trial puts the Government to its burden of proof, but falls far short of affirmatively asserting innocence. *See* DA 45. To the contrary, as set forth in the plea agreement, the transcript for the change of plea proceeding, and his correspondence to the district court, the defendant consistently acknowledged his guilt. The district court reasoned as follows:

> He doesn't assert his innocence. As I say in his letter to me in September of 2009, he talks about how everything he told the government is truthful. What he told the government was he was a drug dealer. A drug dealer in New Haven in the time period charged in the indictment with some of the people named in the indictment. He also told that to Judge Fitzsimmons in May of 2008. At no time has he said he was not a drug dealer including up until today when in response to questioning on the

> witness stand, he acknowledged that he dealt drugs. So he's not asserting his innocence so again he fails in that aspect.

DA 112. Accordingly, the district court acted well within its discretion in concluding that the absence of any assertion of innocence weighed against permitting withdrawal of the defendant's guilty plea.

4. Prejudice to the Government

Finally, although the district court was not required to reach prejudice, *see Rosen*, 409 F.3d at 547, it acted well within its discretion in concluding that this factor also weighed against permitting withdrawal of the guilty plea. The potential unavailability of a witness due to possible witness tampering, *see* DA 46-47, was plainly prejudicial, *see* DA 113. Moreover, the fact that the Government had already proceeded to trial against certain co-defendants and prosecuted multiple trials related to the underlying investigation further supported the district court's finding of prejudice to the Government. *See* DA 47, 113; *United States v. Lopez*, 385 F.3d 245, 254 (2d Cir. 2004) (explaining that prejudice "in the context of plea withdrawal typically refers to depriving the Government of the benefit of its bargain by having the burden of trial preparation suddenly thrust upon it, as well as the potential difficulty to the Government in securing evidence against the defendant that would have been easier to secure at an earlier moment in time"); *United States v. Vega*, 11 F.3d 309, 312, 313 (2d Cir. 1993) (approving the district court's conclusion that permitting withdrawal of the guilty plea

"would prejudice the government since it had already gone through two lengthy and complex trials" of co-defendants).

In addition, the difficulties that the Government inevitably would have encountered in proceeding to trial nearly two years after the entry of the defendant's guilty plea support a finding of prejudice. *See Carreto*, 583 F.3d at 157 ("[T]he Government would have been prejudiced by a withdrawal of the guilty pleas, as the Government surely would have encountered difficulties were it required to re-assemble its evidence after more than a year's delay."). As the Government explained at the May 20, 2010 proceeding, "whenever two years lapses from the time someone has pled guilty to the time of trial, your witnesses become less available. For a number of witnesses, obviously it is the lapse of time and memory." DA 46.

These concerns – whether considered independently or collectively – support a finding of prejudice. The district court acted well within its discretion in concluding that this factor weighed against permitting withdrawal of the guilty plea.

* * *

In short, the district court properly denied the defendant's motion to withdraw his guilty plea. As the district court noted, the defendant's statements during his plea colloquy affirming the voluntariness of his guilty plea, the lapse of nearly two years between the entry of the

guilty plea and the motion to withdraw, the absence of any assertion of innocence, and the prejudice to the Government that would arise from withdrawal all weighed against permitting withdrawal. The district court therefore acted well within its discretion in denying the defendant's motion to withdraw his guilty plea.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: July 5, 2011

Respectfully submitted,

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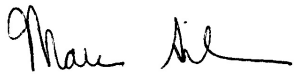

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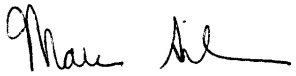
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,743 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ADDENDUM

Federal Rule of Criminal Procedure 11(d)(2)(B) - Withdrawing a Guilty or Nolo Contendere Plea

A defendant may withdraw a plea of guilty or nolo contendere . . . after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal.